UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TOWER INDUSTRIES, INC. d/b/a
ALLIED MECHANICAL

and

Cases 31-CA-26605
31-CA-26644
31-CA-26666

UNITED STEEL WORKERS OF
AMERICA, AFL-CIO-CLC

COUNSEL OF THE GENERAL COUNSELS' STATEMENT OF POSITION TO THE NATIONAL LABOR RELATIONS BOARD

PROCEDURAL HISTORY

On April 1, 2009, the Ninth Circuit granted in part, denied in part, and remanded this case to the Board based on the petition filed by the United Steel Workers of America, AFL-CIO-CLC (the "Union"). *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, AFL-CIO/CLC v. National Labor Relations Board*, 321 Fed.Appx. 581 (C.A. 9).

The Ninth Circuit's decision was based on the Union's petition for review of the Board's order, which reversed the administrative law judge's determination that the Employer committed unfair labor practices. The Ninth Circuit's decision held, in relevant part: (1) the Respondent, Tower Industries, Inc. d/b/a Allied Mechanical (the "Respondent" or "Employer") did not commit an unfair labor practice when it

issued pro-Union employee Marcelo Pinheiro a Disciplinary Action Notice ("DAN") on September 5, 2003, and (2) the Employer did commit unfair labor practices when it suspended and discharged Pinheiro on October 8 and 17, 2003, respectively. *Id.*

By letter dated September 1, 2009, the Board advised the parties that it accepted the remand from the Ninth Circuit and provided the parties with an opportunity to file a statement of position with respect to whether the General Counsel satisfied the initial *Wright Line* burden regarding Pinheiro's suspension and discharge.

FACTS AND ARGUMENT

The Respondent operates a machine shop in Ontario, California, specializing in medium to large precision machining. Pinheiro was a machinist at the Respondent's shop from April 2002 until his discharge on October 17, 2003. *Tower Industries, Inc. d/b/a Allied Mechanical I*, 349 NLRB 1327 (2007).

I. FACTS

A. PINHEIRO'S UNION AND OTHER PROTECTED ACTIVITIES

In January 2003, alleged Sections 8(a)(3) and (4) discriminatee Pinheiro first became involved in the Union campaign that culminated in a March 6, 2003, election. During the campaign, Pinheiro showed his support for the Union by passing out flyers in front of the building and by posting flyers within the building. *Id.* at 1339. Shortly after the Union filed a petition for representation on Friday, January 24, 2003, Pinheiro passed out Union flyers with other Union supporters near the driveway in

front of the building from about 5 a.m. to 6 a.m. Employees, as well as supervisors and management, use this driveway. Once, when passing out flyers, Pinheiro mistakenly handed a Union flyer to supervisor Miguel Sedano. *Id.*

In January 2003, Employee Pinheiro informed night-shift supervisor Eddie Rogers that he intended to support the Union and participate in the campaign. Pinheiro also told supervisor Rogers that he intended to conduct himself professionally throughout the campaign. *Id.* at 1339.

In January 2003, after the petition was filed, Pinheiro also started posting Union flyers around the shop. *Id.* at 1327. Pinheiro posted flyers on the wall next to the bathroom, in the tool crib window, and on the supervisor's office wall. *Id.* at 1339-40. Other non-work flyers, including flyers for the sale of a videotape collection, the sale of computers, and a raffle for hockey tickets, were already posted in these locations. *Id.* at 1340. After the Union flyers disappeared several days in a row, Pinheiro confronted supervisors Rogers and Sedano, stating that he would file a charge if they continued to remove the Union flyers. Supervisor Sedano stated that, because it was Company property, they could do as they wished. *Id.* at 1340.

On April 8, 2003, Pinheiro was laid off, and was recalled in July 2003. *Id.* at 1340. On September 9, 2003, Pinheiro testified at the Board hearing on behalf of Counsel for the General Counsel and the Union. *Id.* at 1342. In addition, charges and amended charges naming employee Pinheiro were filed on March 7, 2003 (31-CA-26184), March 19, 2003 (31-CA-26194), April 25, 2003 (31-CA-26184), and May 19,

2003 (31-CA-26276). Notably, Pinheiro's Board testimony occurred just a few weeks before his suspension and discharge.

B. PINHEIRO'S SUSPENSION & DISCHARGE

On Monday, October 6, 2003, after several weeks of being denied overtime, Pinheiro went to Sedano's office and said, every time he had a job requiring overtime, he was taken off the job and someone else got the overtime. *Id.* at 1343. Sedano told Pinheiro that employee Stewart Davies got the overtime because he had more seniority than Pinheiro. *Id.* at 1343. Pinheiro, incredulous at this explanation that had no basis in Company policy, asked, since when does seniority play a role in who gets overtime. *Id.* at 1343. Sedano said, "Since all this union thing and we got into such trouble with the Labor Board." *Id.* at 1343. Then, Pinheiro turned to leave Sedano's office, and, on his way out the door, uttered the words, "Suck dick, what does a guy have to do to get a fair shake around here." *Id.* at 1343. Pinheiro explained that the phrase, "suck dick," expressed his frustration with the treatment he was getting from the Respondent. *Id.* at 1344. Former co-worker Sergio Barragan, a witness to the conversation, stated that it was not until after turning to leave Sedano's office that Pinheiro said, "suck dick." *Id.* at 1343. Barragan testified that Pinheiro was known for the phrase, "suck dick," and that he used the phrase daily, even hourly, at the shop. Barragan also confirmed this in a statement to Marisela Rodriguez in Human Resources. *Id.* at 1343-44.

About ten minutes after the conversation, supervisor Sedano came to Pinheiro's machine and told him that Pinheiro had told Sedano to do something that was very disrespectful. *Id.* at 1343. Pinheiro told Sedano, "I never told you to suck my dick." I explained that I only said, "suck dick," to myself, and that the comment was not directed at Sedano. Although employees used bad words in the shop all the time, even in front of supervisors, Pinheiro apologized for saying a bad word in front of Sedano. *Id.* at 1343.

Two days later, on Wednesday, October 8, 2003, Pinheiro, having never received a verbal or written warning for the use of foul language, was suspended, pending an investigation, for insubordination. *Id.* at 1344. After a lengthy unpaid suspension, Pinheiro was called back to work on October 17, 2003, and fired. *Id.* at 1344.

The Respondent's President Marc Slater explained that his decision to suspend Pinheiro was based partly on Pinheiro's alleged admission contained in the human resources' report. *Id.* at 1344.

The evidence established that Pinheiro did not direct the phrase to Sedano, but instead, had turned to leave Sedano's office when he uttered the phrase: "suck dick." This phrase, while certainly inappropriate in most situations, is just one example of rampant foul language in the almost all-male atmosphere of the shop. *Id.* at 1345-46. Management admitted during trial that profanity was common among employees and supervisors. *Id.* at 1337-38.

II. THE LEGAL STANDARD

In cases where an employer's motivation for disciplining an employee is disputed, the Board applies the analytical framework set out in *Wright Line*, 251 NLRB 1083, 1089 (1980). To establish a violation under *Wright Line,* the General Counsel bears the burden of showing that union animus was a motivating or substantial factor for the adverse employment action. *Regency Grande Nursing and Rehabilitation Center*, 354 NLRB No. 75, slip op. at 2, fn. 8 (2009). The elements required to support such a showing are (1) union or protected concerted activity by the employee, (2) employer knowledge of that activity, and (3) union animus on the part of the employer. *Id.* citing *Desert Springs Hospital Medical Center,* 352 NLRB 112 fn. 2 (2008); *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. _F.3d_, 2009 WL 2526487 (2d Cir. Aug. 20, 2009). The Board and the circuit courts of appeal have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action. *Id.* citing *American Gardens Management Co.,* 338 NLRB 644, 645 (2002). *Regency Grande Nursing and Rehabilitation Center*, 354 NLRB No. 75 (2009). Since *Wright Line* is a causation standard, the Board agreed with this addition to the formulation. *Id.*

> It is also well settled, however, that when an employer's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the employer desires to conceal. The motive may be inferred from the total circumstances provided.

> Moreover, under certain circumstances, the Board will infer animus, from the record as a whole, in the absence of direct evidence.

Coastal Insulation Corp., 354 NLRB No. 70, slip op. at 33 (2009) citing *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

Evidence of the following support an inference of animus: (1) suspicious timing, (2) false reasons given in defense, (3) failure to adequately investigate alleged misconduct, (4) departures from past practices, (5) tolerance of behavior for which the alleged discriminatee was fired, (6) disparate treatment of the discharged employees, and (7) reassignments of union supporter from former duties isolating the employee. *Id.* citations omitted.

The Board has also found violations of the Act when the reasons for the alleged discriminatory conduct "are baseless, unreasonable or contrived so as to raise a presumption of wrongful motive, or where the weakness of an employer's reasons for adverse personnel action can be a factor raising a suspicion of unlawful motivation." *Aero Ambulance Serv., Inc.*, 327 NLRB 639, 650 (1999) (quotation omitted), *enfd.* 203 F.3d 816 (3d Cir. 1999) (table). These factors "do not exist in isolation, but frequently coexist." *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), *enfd.* 97 F.3d 1448 (4th Cir. 1996) (table). Assessment of the existence thereof, however, turns on the facts of the case. *See, e.g., Summa Health System, Inc.*, 330 NLRB 1379, 1404 (2000) ("Motivation of union animus may also be inferred from the record as a whole, where an employer's proffered explanation is implausible or a combination of factors circumstantially support [sic] such inference.").

III. ANALYSIS

Here, the evidence clearly supports an inference of animus directed at both Pinheiro's union activities and his participation in Board proceedings. As stated above, the departure from past practice, the tolerance of behavior for which the alleged discriminatee was fired, and the disparate treatment of Pinheiro, are all factors that support an inference of animus. In fact, the Board noted in its 2007 decision that Respondent's knowledge of Pinheiro's Union activity and its animus toward that activity were established in *Allied I*, 343 NLRB 631 (2004), where the Board found that the Respondent unlawfully disciplined Pinheiro on January 31, and March 25, 2003, because of his Union activities. *Allied II*, 349 NLRB at 1329. As such, the evidence establishes that the animus was a motivating factor for Pinheiro's suspension and discharge.

Respondent's admission that foul language is "business-as-usual" at the facility is underscored by the apparent disparate treatment of Pinheiro made clear by the wide berth given to other employees for cases of insubordination, disrespect, and usage of foul language far more egregious than Pinheiro's. *Allied II*, 349 NLRB at 1337-38.

For example, according to employee Edwin Shook, employee Jose L. Rodriguez,[1] on more than one occasion, said to his supervisor Tom Bechtol, "fuck you, mother fucker." *Id.* at 1343.

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1 According to Shook, Rodriguez wore anti-Union t-shirts during the Union campaign.

Also, on December 13, 2001, employee Albert Viramontes verbally attacked night-shift supervisor Eddie Rogers. According to the DAN issued to Viramontes on December 14, 2001, the verbal attack consisted of loud swearing. *Id.* at 1344. The report attached to the discipline states that Viramontes said "fuck you" to supervisor Rogers. Viramontes was not fired for this incident. *Id.*

Another employee, Dennis Scott, was involved in two separate incidences — first, a verbal altercation with a co-worker in March 2003, and second, a physical confrontation with a co-worker in April 2003. Following the second incident, in which Scott choked a co-worker, Scott was given a choice between discharge, or suspension and an anger management course. Scott initially chose to resign, but then took an anger management course and returned to work for the Respondent. *Id.* at 1344-45.

By comparison, an incident occurring in 2003 involving employee Willie Martin was found by the Respondent to be severe enough to warrant discharge. In this incident, Martin followed around supervisor Rogers for a period of time, after which Rogers told Martin to go to work, and Martin "flew off the handle and started yelling and screaming, in Eddie's face, swearing at him, threatening him, spitting on him, call him obscenities and just, basically, went crazy . . . " *Id.* at 1344.

The evidence establishes that Pinheiro's conduct on October 8, 2003, was not at all serious enough to warrant discharge given the Respondent's tolerance of far more egregious incidences. Because the Respondent's proffered reason is pretextual, animus can be inferred. Further, the animus has been established as a motivating

factor for Pinheiro's suspension and discharge. As set forth in the Ninth Circuit's decision, the Respondent failed to meet its burden that it would have suspended and discharged Pinheiro even if there were no Union or other protected activity. *United Steel*, 321 Fed.Appx. at 582-83, fn. 1. Accordingly, Pinheiro's October 2003 suspension and discharge violated Sections 8(a)(1), (3) and (4) of the Act.

CONCLUSION

As set forth herein, and on the record as a whole, precedent and the preponderance of evidence clearly establish that, as set forth in the Consolidated Complaint, the Respondent, Allied Mechanical, Inc., violated Sections 8(a)(1), (3) and (4) of the Act by suspending Pinheiro on October 8, 2003, and on October 17, 2003, discharging him.

Accordingly, the General Counsel respectfully requests that the Board adopt the Ninth Circuit's holdings regarding Pinheiro's suspension and discharge.

Dated: Los Angeles, CA
September 21, 2009

Respectfully submitted,

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